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United States Supreme Court

OCTOBER TERM, 1959

No. 612

HAROLD FRANKLIN CLIFF,

Petitioner

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered upon October 30, 1959, affirming the judgment of the United States District Court for the Southern District of Florida rendered February 6, 1959.

OPINION BELOW

The opinion of the court below entered upon October 30, 1959, is printed in an appendix to this petition, for the convenience of this Court.

BASIS OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was filed, as stated, upon October 30, 1959; petition for rehearing was duly filed upon November 23, 1959 and an order was entered staying mandate for thirty days from November 28, 1959 upon said application.

Jurisdiction is invoked under Section 1254(1) of Title 28 of the United States Code; and Rule 19(1)(b) Revised Rules of the Supreme Court of the United States; Title 28 U.S.C.

QUESTION PRESENTED

The sole question presented for determination is whether there was a sufficient showing, by the prosecution, that the petitioner knowingly and wilfully prepared or assisted in the preparation of false income tax returns.

The petitioner assigns as error the decision of the United States Court of Appeals which affirmed the District Court.

STATEMENT OF THE CASE

Count One of the indictment charged that the defendant wilfully made a false income tax return in March, 1947, for Julius and Antoinette Ellis in that the Ellis' were entitled to deductions of $90.54, not the sum of $1,507.25 as claimed in said return (1). The Government called Mr. Ellis as a witness and he testified, in essence, on direct examination that the defendant had made his tax return (16); that Mr. Cliff (defendant) had put down the figure of $250.00 deduction for entertainment (18); that the defendant had taken a deduction of $20.00 a week for 52 weeks as the proper deduction for use of the Ellis' car in his work although Ellis had not given the defendant that figure (19); and that the $200.00 charitable deduction was the defendant's figure in that Ellis did not know how much that he had given to charity (19-20).

Upon cross examination Mr. Ellis testified that his entertainment expenses were about $300.00 (which is $50.00 more than the return claimed) (21); Mr. Ellis did not tell the defendant that he was being compensated for the use of his automobile by the company (26) and Mr. Ellis only received gas and oil for his car and was not compensated for repairs, tires, depreciation, etc. for the use of the car (24-25); the witness did not remember how much he and his wife gave to the church although the witness does remember that he did not give the defendant the $200.00 figure which was claimed (28-30).

Count two of the indictment charged that the defendant willfully made a false income tax return for J. A. Holsenbeck by claiming deductions of $1,489.75 when the defendant knew that the proper deductions were $856.75 (2). Mr. Holsenbeck testified that the charitable deduction was about $100.00 too

much (96-97); that the witness told the defendant he used 10 to 15 gallons of gas a week in his work and that the witness thought that the $575.00 deducted for auto [illegible]enses was too much (97); and the defendant took $12.50 "supplies depreciation" concerning which the witness knew nothing (102).

Cross examination of Mr. Holsenbeck brought out that the witness did not know how much his wife donated to charity (105, 111); that the witness used about 15 gallons of gas a week in getting back and forth to work (103); that the witness had to furnish his own gun, cartridges, flashlights and batteries at work and that these good depreciated (104).

Count five of the indictment charged that the defendant wilfully made a false income tax return for Thomas and Elizabeth Drummond for the year 1946, in that the defendant took deductions in the sum of $892.15 when the defendant knew that the proper deduction was $232.15 (3-4).

On direct examination Mr. Drummond testified that the defendant had made out his income tax return (38) and that the defendant had supplied the deductions of $460.00 to charity, $125.00 for theft of tools, $289.00 for tools and equipment and uniforms, and $17.25 for an auto tag (39-40). The witness denied on direct examination that he had given the dependent any of the above figures (38-39).

On cross examination the witness testified that he told the defendant that he had lost some tools, but that he did not give the defendant any monetary value of the said tools (43).

Count six of the indictment charged that the defendant wilfully made a false income tax return for Fred and Elizabeth Granger for the year 1946 by claiming deductions in the

amount of $2,555.74, when the defendant knew that the Granger's were only entitled to deductions in the sum of $1,340.24.

Mrs. Granger testified that the defendant had prepared the income tax return in question (122); that she did not furnish the defendant either the $950.00 charitable deduction, or the $265.00 deduction for entertainment of customers contained in her return. (123).

There was no evidence given concerning any information that may have been given by Mr. Granger to the defendant on the above deductions. On cross examination Mrs. Granger testified that she gave about $100.00 to charity and that her husband gave money independent of her in an unknown amount (128). The witness thought at the time of making the return that the amount of $950.00 was the proper charitable deduction (133), although she did not feel that the amount was correct at the time of the trial (134). Moreover, the witness does not maintain that the $265.00 deduction for entertainment was not correct, her only statement is that she did not furnish the defendant that particular figure (133).

Upon the above evidence and testimony, the defendant was found guilty as charged upon the above counts (215-216).

REASONS FOR GRANTING PETITION

While this case involves the sufficiency of proof, the overall implications and the possibility of the application of this type of procedure by the government to similar cases throughout the United States warrants its consideration by this Court.

It is common knowledge that under the present Income Tax

laws there has developed a wide spread practice whereby persons relatively unqualified assist in the preparation of returns. This decision may well cause many of them to be placed in jeopardy of criminal prosecution when their only short coming is incompetence in that particular field. While this behavior should not be condoned it should be solved by legislative requirements of greater proficiency, rather than prosecution for negligence.

Further, of the returns which are filed a staggering number contain errors. The Internal Revenue Service recognizes the fact that a large proportion of these errors result when a taxpayer takes an unauthorized deduction. Many taxpayers are inexact in keeping records for deductions and many, in fact, keep no records whatsoever. Notwithstanding this they are entitled to the deduction and knowing this will attempt to estimate the amount to which they are lawfully entitled. This process of estimating deductions is followed by many persons who assist others in the preparation and filing of returns. To subject them to criminal prosecution, when errors are discovered in later years, is patently unjust. This is especially true when a conviction is based upon testimony of witnesses who themselves fear action by the government, and have been subjected to government investigation.

Petitioner submits that a conviction under this statute should not be upheld without some type of **direct proof** that a defendant **knowingly and wilfully** assisted in preparing false returns.

The petitioner was found guilty of preparing false or fraudulent income tax returns. The government in proving its case, relied mainly, upon the testimony of persons whose tax returns had been prepared by the petitioner. All these persons had

signed the return swearing everything therein was correct. In each case the person already had been examined by the Internal Revenue Service, and had been required to pay additional tax on the deficiency. During this procedure each had been required to sign statements as to the circumstances in question.

Petitioner contends that an overall reading of the entire record clearly supports the position that at worst he was negligent in not requiring additional proof of deductions from his clients. None of the prosecution witnesses said the petitioner persuaded them to put down unlawful deductions or that he acceded to such wishes. Rather the record is replete with statements which show that petitioner was attempting to estimate to the best of his capabilities, the deductions to which the taxpayer was lawfully entitled. It was a natural tendency for all the witnesses to say that they didn't give petitioner certain figures or that they couldn't recall having claimed certain deductions. The length of time which has elapsed since the filing of the returns alone could cause convenient memory failure. Coupled with this, however, is the fact that to admit at the trial that he had originally supplied the petitioner with this disputed deduction would be an admission on the part of the witness that he was lying when the return was filed. This would be difficult to expect of a person under all circumstances but it is particularly so where the witnesses had been subjected to government investigation about their own returns. Certainly they would not wish to say anything which might cause them further trouble, and subject them to possible prosecution.

CONCLUSION

In view of the nation-wide practice outlined and the type of testimony used by the government in this type of prosecution the petitioner respectfully prays that this petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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Jacksonville, Florida

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Jacksonville, Florida

Attorneys for Petitioner.

CERTIFICATE

I hereby certify that I have served a copy of the foregoing petition for Writ of Certiorari, by mail, to Miss Edith House, Assistant United States Attorney, Federal Building, Jacksonville, Florida, and a copy to the Solicitor General, Department of Justice, Washington 25, D. C. on this 24th day of December, 1959.

Zach H. Douglas

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit, Rendered October 30, 1959.

Before RIVES, *Chief Judge*, and TUTTLE and JONES, *Circuit Judges*.

PER CURIAM: The only question presented is the sufficiency of the evidence of guilt to sustain the judgment of conviction. In our opinion it was sufficient. The judgment is

AFFIRMED.

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OCTOBER TERM, 1959

HAROLD FRANKLIN CLIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Statute:

Internal Revenue Code of 1939, Sec. 3793(b)(1) (26 U.S.C. 1952 ed., Sec. 3793(b)(1)) 2

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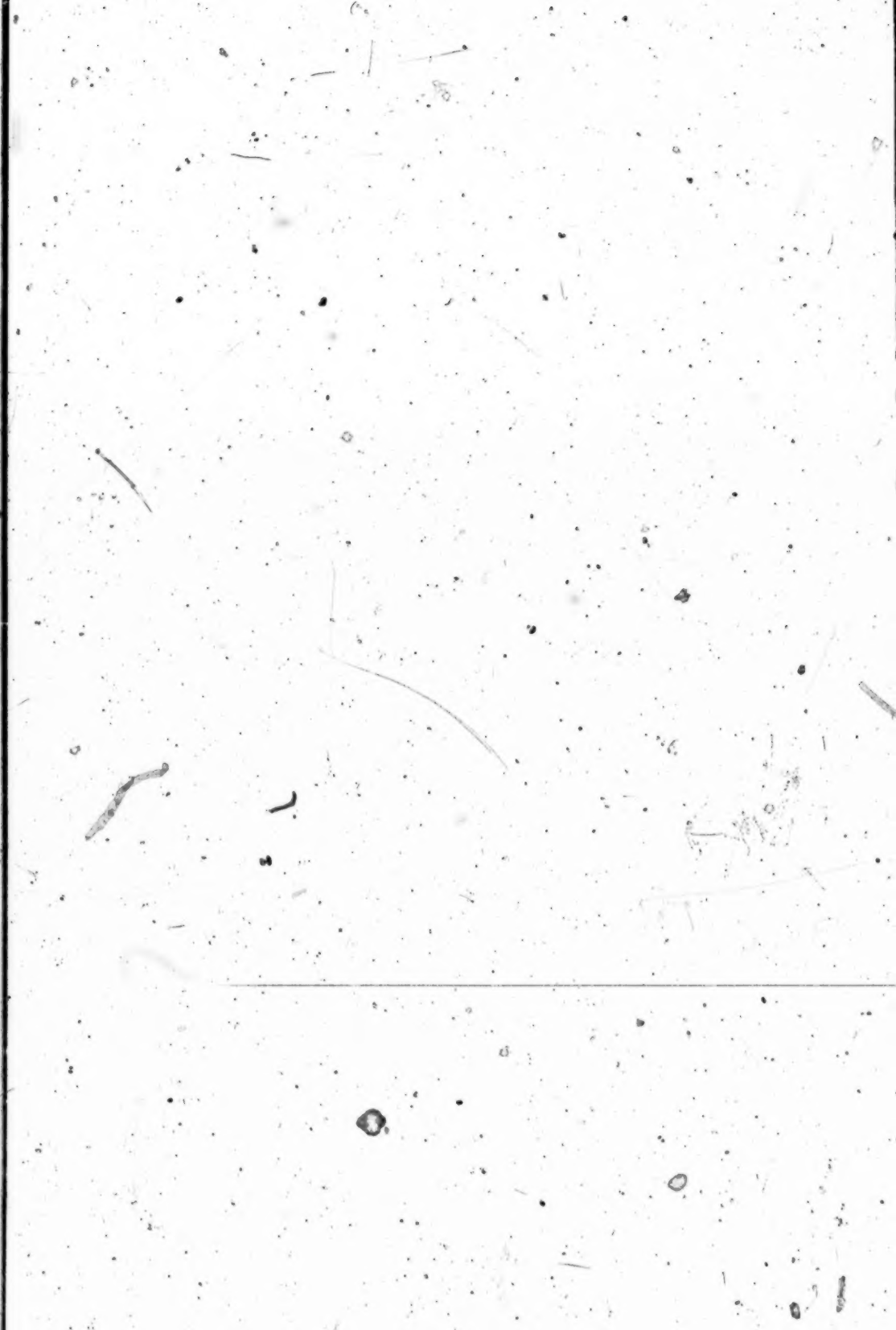

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 10) is reported at 271 F. 2d 126.

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1959 (R. 225–226). A petition for rehearing was denied on November 28, 1959 (R. 234). The petition for a writ of certiorari was filed on December 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support the verdict.

STATUTE INVOLVED

Section 3793(b)(1) of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.) provides:

> Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT

On October 1, 1952, petitioner was charged in a seven-count indictment—filed in the United States District Court for the Southern District of Florida—with having wilfully aided and assisted in the preparation and presentation of false income tax returns for named taxpayers, fraudulently overstating their deductions in substantial stated amounts, in violation of Section 3793(b)(1) of the Internal Revenue Code of 1939 (R. 1–5). After a jury trial, petitioner was found guilty on four counts (R. 213, 215). On February 6, 1959, a general sentence of one year in prison was imposed (R. 215–216).

The evidence to support the verdict may be summarized briefly as follows:

In January, 1947, petitioner—who was engaged in preparing income tax returns for others—circularized

potential clients with an advertisement containing the statement: "Income tax returns expertly prepared for many thousands, with desired results" (R. 180, 182). One Ellis, who does not appear to have received such a circular, learned about petitioner's tax return services from a friend, who advised him that petitioner "was very good and could save [him] some money" (R. 33). Accordingly, Ellis and his wife called upon petitioner, gave him certain information with respect to their income and deductions, and signed the tax return before it was completed (R. 16, 27–28). The return, as prepared by petitioner and filed, showed a deduction of $1,040.00 for automobile expense, representing $20 a week for 52 weeks. Ellis did not give petitioner that figure, but petitioner said he was entitled to deduct that amount for use of his car in business. The car was a 1932 Chevrolet, and—as Ellis told petitioner at the time he was preparing the return—Ellis' employer was furnishing all of the gasoline, oil and tires. (R. 19, 25, 31.) Petitioner also entered a deduction of $200 for charitable contributions on the return. Ellis told petitioner that he did not know the amount of his contributions, but petitioner advised him that he was entitled to claim a deduction for contributions of 10% of his salary, *i.e.*, $200. (R. 19.)

In preparing the 1946 income tax return of one Holsenbeck, petitioner entered a deduction of $575.00 for automobile expense, although Holsenbeck told him at the time that he had used his car only for personal purposes and driving back and forth

to work (R. 97–98, 101–102, 105). Petitioner also entered deductions of $155 for charitable contributions, although Holsenbeck advised him that his actual contributions totalled between $35 and $50 (R. 96–97).

On the 1946 tax return of one Drummond and his wife the petitioner recorded a deduction of $460 for charitable contributions, although Drummond told him that his contributions would not exceed "$100, or a little over $100 * * *" (R. 36, 39). Also claimed were deductions of $125.00 for theft of tools and $289.00 for "Tools, Equipment and Uniforms" (R. 39). Drummond did not furnish petitioner with either of these figures (R. 40). Although Drummond advised petitioner that he had lost some tools, he did not tell him what their value might be (R. 43).

Mrs. Elizabeth Granger called on petitioner and furnished him with information necessary to prepare the 1946 income tax return of her husband and herself. She testified that Mr. Granger furnished petitioner with no figures. (R. 122, 124–125.) The figures given petitioner for charitable contributions by Mrs. Granger do not appear on the return. Petitioner recorded a deduction of $950.00, which was somewhat higher than the figure Mrs. Granger gave him. (R. 123.) The correct figure was about $150.00 (R. 135). Petitioner also claimed on this return a deduction of $265.50 for "Entertainment of Customers." Mrs. Granger furnished him with no such figure, nor with any information whatsoever relating to entertainment of customers. (R. 123, 126.)

ARGUMENT

The sole question presented by the petition for a writ of certiorari—and on the appeal below—is the sufficiency of the evidence to support the jury's verdict. On that issue it is apparent that on the facts of record summarized above the jury was justified in finding that the numerous "errors" in favor of petitioner's clients did not constitute merely negligence or innocent mistake, but were the product of petitioner's fraud. His attempts (Pet. 7) to depreciate the reliability of the testimony given by the Government's witnesses rest wholly upon considerations which the jury presumably took into account in weighing the evidence. The courts below were plainly right, we submit, in concluding that the verdict of guilty was supported by the evidence.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.
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JANUARY 1960.

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